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No. 08-938

In The
Supreme Court of the United States

PHAR-MOR, INC.,
Petitioner,

v.

McKESSON CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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April 6, 2009

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

REPLY TO BRIEF IN OPPOSITION

In the Petition before this Court, the Petitioner seeks review of a recent, and controversial, interpretation of the Uniform Commercial Code by the Sixth Circuit Court of Appeals. Specifically, the Petition presents a pure question of law with significant consequences to commercial lending transactions both in and out of bankruptcy proceedings. The underlying purpose behind the States' adoption of the "Uniform" Commercial Code was to provide both clarity and certainty to business transactions involving interstate commerce, and the Sixth Circuit opinion undermines the stability and predictability required in the commercial lending system.

Respondent's Brief in Opposition is devoted to shifting this Court's attention away from this fundamental question of law. Respondent attempts to accomplish this goal through an unsubstantiated claim, previously disregarded by the reviewing courts below, that the Petitioner lacks standing to challenge the validity and priority of the subject proof-of-claim under § 2-702(C) of the Uniform Commercial Code. In addition, Respondent mischaracterizes the impact of Bankruptcy Code § 546(c) upon the decision of the Sixth Circuit, vis-a-vis its assertion that the decision is premised upon an application of the plain text of that Bankruptcy Code provision. In reality, neither of these arguments are credible and each lacks any meaningful basis in law or fact.

I. The Petitioner Has Standing To Object To Respondent's Proof-of- Claim.

Respondent asserts that the Petitioner has no standing to challenge its asserted proof-of-claim. This argument is nothing more than a "red herring" which the Respondent has unsuccessfully raised in the courts below in an attempt to preclude review of the merits of the substantive legal issue.

In the reclamation procedures order entered by the bankruptcy court in this case on January 2, 2002, the bankruptcy court stated unequivocally that the order granted the debtor [Petitioner] the right to assert "further proceedings to determine the extent to which the reclamation claim amounts are subject to further defenses by reason of liens granted to the Debtor's secured lenders." Thus, the bankruptcy court's order explicitly and unequivocally preserved the secured creditor defense to the debtor's bankruptcy estate.

In addition, the standing argument asserted by the Respondent in this matter has been rejected by other courts in cases under substantially similar facts. *See, In re Dana Corp.*, 367 B.R. 409, 421 (Bankr. S.D. N.Y. 2007) ("the Reclamation Claimants were not lulled by the Debtors into believing that they would receive administrative claims for their reclamation demands. . . the Reclamation Procedures Motion and Order both reference the possibility that reclamation claims may be subject to prior liens."); and *In re Pittsburgh-Canfield Corp.*, 309 B.R. 277, 290 (6th Cir. BAP 2004) (rejecting estoppel argument and noting that the reclamation procedures order referenced the bank liens as defenses to the reclamation demands).

The Respondent's assertion regarding Petitioner's lack of standing is inconsistent with the bankruptcy court's January 2, 2002 reclamation procedures order and applicable case law, and therefore should be rejected by this Court.

II. In Its Decision, the Sixth Circuit Stated That Because it Was Addressing a Specific Issue of Law under the Uniform Commercial Code, the Bankruptcy Court's Factual Findings Were "Immaterial".

Respondent would lead this Court to believe that the Sixth Circuit's decision was based upon the application of the plain text of § 546(c) of the Bankruptcy Code. To the contrary, the Sixth Circuit's interpretation of §2-702 of the Uniform Commercial Code was the underlying foundation of the decision. The Sixth Circuit specifically opined that, "[w]e find that Ohio Rev. Code § 1302.76(B) (UCC 2-702(2)) grants a properly reclaiming vendor. . . a right to reclaim its goods and that § 1302.76(C) (UCC 2-702(3)) does not allow a secured creditor's claim to defeat that right." (Pet. App. Page 13a.).

In addition, the Sixth Circuit specifically stated that, "[t]his case presents a question of law or an application of the law to the given circumstances, and the bankruptcy court's factual findings are immaterial to the disposition of this appeal." (Pet. App. Page 49).

Thus, the Sixth Circuit's interpretation of the Uniform Commercial Code was in no way reliant upon the Bankruptcy Code or the factual findings of the bankruptcy court. The Circuit's decision, which is in conflict with decisions of the various courts of other

circuits, is clearly applicable and equally damaging outside of a bankruptcy proceeding.

Finally, Respondent's assertion that the Sixth Circuit's decision in this case has no application in bankruptcy cases filed after October 2005 is inconsistent with the language of the current version of § 546(c) of the Bankruptcy Code. The amendment to § 546(c) became effective in October 2005 and provides, in pertinent part, that a reclamation claim "is subject to the prior rights of a holder of a security interest in such goods".

In its opinion, the Sixth Circuit held that a bank cannot assert a security interest in goods that are the subject of a reclamation claim because the bank does not qualify as a good faith purchaser under § 2-702 of the Uniform Commercial Code. If the reclamation goods are not subject to a bank's security interest, the reclamation claimant will continue to have a superior claim, despite the bank's prior UCC lien filings. Therefore, the Sixth Circuit decision will continue to have application in current and future bankruptcy cases.

CONCLUSION

For the reasons provided herein and in the Petition for Writ of Certiorari, the Petition should be granted. It is time to settle the debate on this crucial issue of commercial law.

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